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March 7, 2007

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: August 23, 2006

Case Number: TSO-0422

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization¹ under the Department of Energy's (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled, "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." A Local DOE Security Office (LSO) suspended the individual's access authorization under the provisions of Part 710. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should be restored.

I. Background

The individual works for a DOE contractor in a position that requires him to hold a DOE security clearance. During a routine background investigation, the LSO learned that the individual had received and transmitted sexually explicit electronic mail (e-mail) from his work computer. This information prompted the LSO to conduct a Personnel Security Interview (PSI) with the individual in October 2005 (2005 PSI). Soon thereafter, the LSO referred the individual to a board-certified psychiatrist (DOE psychiatrist) for a forensic psychiatric examination. The DOE psychiatrist examined the individual in March 2006 and memorialized his findings in a report (Psychiatric Report or Exhibit 6). In the Psychiatric Report, the DOE psychiatrist concluded that the individual's behavior in connection with the computer was not the result of a mental illness or condition. However, the DOE psychiatrist determined that the individual has been a user of alcohol habitually to excess in the past. Ex. 6 at 16. The DOE psychiatrist could not opine after the psychiatric examination whether the individual was showing adequate evidence of reformation from his past excessive use of alcohol and made no recommendation of what might constitute adequate evidence of reformation in this case. *Id.* at 17.

In June 2006, the LSO sent the individual a letter (Notification Letter) advising him that it possessed reliable information that created a substantial doubt regarding his eligibility

¹ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

to hold a security clearance. The LSO also advised the individual that the derogatory information fell within the purview of two potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections (j) and (l) (hereinafter referred to as Criteria J and L).²

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations and requested an administrative review hearing. On August 31, 2006, the Director of the Office of Hearings and Appeals (OHA) appointed me as Hearing Officer in the case. Subsequent to my appointment the individual retained an attorney to represent him in this proceeding. At the hearing that I convened in this case, seven witnesses testified. The LSO called one witness and the individual presented his own testimony and that of five witnesses. In addition to the testimonial evidence, the LSO submitted 10 exhibits into the record; the individual tendered none.

II. Regulatory Standard

A. Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden on the individual because it is designed to protect national security interests. This is not an easy burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that granting him an access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h).

² Criterion J relates to information that a person has “[b]een, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.” 10 C.F.R. § 710.8 (j). Criterion L relates in relevant part to information that a person has “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . .” 10 C.F.R. § 710.8(l).

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to a person's access authorization eligibility in favor of the national security. *Id.*

III. The Notification Letter and the Security Concern at Issue

As previously noted, the LSO cites Criteria J and L as the bases for suspending the individual's security clearance. To support Criterion J, the LSO relies principally on the DOE psychiatrist's opinion that the individual was a user of alcohol habitually to excess from 1971 to 1998 and perhaps in 2004 and 2005. In addition, the LSO cites the individual's alleged statements that: (1) his wife asked him to stop drinking and is not comfortable with his drinking in front of her children, (2) his mother expressed a concern about his excessive drinking habits, and (3) he drove in an intoxicated state in the 1970s and 1980s.

I find that the information set forth above constitutes derogatory information that raises questions about the individual's alcohol use under Criterion J. The excessive consumption of alcohol is a security concern because that behavior can lead to the exercise of questionable judgment and the failure to control impulses, which in turn can raise questions about a person's reliability and trustworthiness. *See* Guideline G of the *Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House.

With regard to Criterion L, the LSO refers to the individual's statements to the DOE psychiatrist that he hides his drinking from his wife by drinking in a grocery store parking lot. In addition, the LSO cites the individual's use of a government-issued computer at work to access internet chat rooms where he had elicited sexual conversations and sent sexually explicit e-mails.

I find that the individual's concealment of information about his drinking from his wife may increase his vulnerability to coercion, exploitation, or duress and possibly render him susceptible to blackmail. As for the individual's misuse of the government-issued computer, I find that such conduct raises questions about his judgment, reliability, and trustworthiness and his willingness to comply with rules and regulations, all of which could indicate that the individual might not properly safeguard classified information.

IV. Findings of Fact

The individual does not dispute that he habitually used alcohol to excess from the late 1970s until 1998. Transcript of Hearing (Tr.) at 116. He denied, however, that he used

alcohol habitually to excess in 2004 and 2005. He maintained that the last time that he was intoxicated was 1998. *Id.*

In 1998, the individual met his current wife in an internet chat room. *Id.* at 60, Ex. 6 at 7. The individual relocated from one State to another to marry his current wife in November 1998. Tr. at 61. The individual became a stepfather to his wife's two children when the couple married. *Id.* at 62.

According to the wife, shortly after she and the individual married she noticed that the individual drank one beer everyday. *Id.* at 64, 74. The wife told the individual that she did not want him to drink in front of the children and that she wanted an "alcohol-free" home. *Id.* at 65. She explained at the hearing that she rarely drinks and had a father who abused alcohol and for these reasons she did not want alcohol to be a part of her or the individual's life. *Id.* at 63-65. The individual complied with his wife's wishes and did not consume alcohol in their home after November 1998. *Id.* at 74. He did, however, drink alcohol outside of the house without his wife's knowledge approximately 50 times between 1998 and 2005. Ex. 6 at 11.

In 2002, the individual's marriage entered a rocky period and the individual began spending time in internet sex chat rooms while at home. *Id.* at 3. In 2003, the wife learned of the individual's internet use and she insisted that the individual consult with Counselor #1. *Id.* The individual received therapy from Counselor #1 twice each week for a six-month period. *Id.* In January 2004, the individual posted a personal ad on the internet and the wife found out about the ad. *Id.* at 4. The wife decided that the individual should return to counseling. *Id.* When the individual consulted Counselor #1 again, she referred him to Counselor #2 with whom he had four counseling sessions in January and February 2004. *Id.* In October 2004, the individual used his government-issued computer at work 12 times to access his personal e-mail account and send sexually explicit e-mails. Tr. at 106.

V. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c).³ After due deliberation, I have determined that the individual's access authorization should be restored. I find that restoring the individual's security clearance will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

³ Those factors include the following: the nature, extent, and seriousness of the conduct, the circumstances surrounding the conduct, to include knowledgeable participation, the frequency and recency of the conduct, the age and maturity at the time of the conduct, the voluntariness of his participation, the absence or presence of rehabilitation or reformation and other pertinent behavioral changes, the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress, the likelihood of continuation or recurrence, and other relevant and material factors.

A. Criterion J: Habitual Use of Alcohol to Excess

There are two issues relating to the individual's alleged habitual use of alcohol to excess in this case. The first issue is whether the individual consumed alcohol habitually to excess at any time after 1998. The second issue is whether the individual is reformed from his past excessive use of alcohol to excess.

1. The Individual's Use of Alcohol after 1998

At the hearing, the individual discussed his post-1998 drinking habits in detail. Beginning in 2004, the individual began drinking alcohol in a grocery store parking lot in the afternoon. Tr. at 118. He explained that he was too cheap to go to a bar so he would purchase his beer at the grocery store and consume it over a two-hour period in his car where he listened to tapes. *Id.* He testified that he is a certified master hypnotist and he uses the quiet time in his car to write scripts for hypnosis. *Id.* at 118. The individual testified that in 2004 he consumed 37 ounces of beer on two occasions in the parking lot and 20 ounces of beer on four occasions in the parking lot. *Id.* at 122. In 2005, the individual consumed 20 ounces of beer in the parking lot on six occasions, and in 2006 he consumed 20 ounces of beer in the parking lot on two occasions. *Id.* He testified that his last drink was in June 2006 when he was on an out-of-town business trip and he consumed two 12-ounce beers. *Id.* at 130. The individual also testified that he never felt impaired at anytime between 1998 and 2006 after he had consumed alcohol. *Id.* at 120.

A family friend testified that she has never seen the individual consume alcohol but has witnessed him refuse alcoholic beverages. *Id.* at 56-57. One of the individual's co-workers testified that he plays poker with the individual and that the individual has declined to consume alcoholic beverages at these poker parties. *Id.* at 48-52. The wife testified that the individual has honored her request that he not drink alcohol at home. *Id.* at 76. She stated that one day she found a beer can in the individual's truck. *Id.* She confronted him about the beer can and he told her that he "sometimes has a beer after work." *Id.* She added that she assumed that he might drink beer once in a while and she decided not to talk about it. *Id.* She opined that alcohol has not impacted their life in any way. She related that after the individual married her, he adjusted his work schedule so he could get off early to transport his stepchildren to various activities. *Id.* at 71. She stated that he is at home every night and cooks dinner most nights. *Id.* She noted that the individual's mother has commented to her that it is "good to see [the individual] not including alcohol in his life" since their 1998 marriage. *Id.* at 70-71. She testified that she is very verbal and does not hesitate to express her thoughts to her husband. *Id.* at 67. For example, she found his chewing tobacco to be a disgusting habit and she asked him to stop the behavior. *Id.* at 72. She stated that he no longer chews tobacco. *Id.* The wife concluded that she believes that her husband is afraid to incur her wrath. *Id.* at 85. The individual testified that his wife told him to stop drinking in parking lots after she read the Psychiatric Report. *Id.* at 144. The individual testified that he will not drink in the parking lot again. *Id.* at 146.

A board-certified psychiatrist who evaluated the individual in September 2006 testified on his behalf at the hearing (personal psychiatrist). *Id.* at 149. The personal psychiatrist opined that the individual was not drinking habitually to excess after 1998. *Id.* at 158. He pointed out that the individual has not had any legal issues associated with his drinking, has suffered no health issues from his drinking and has not demonstrated any impairment in his social or occupational functioning from his alcohol consumption. *Id.* at 158. He also opined that the individual does not even meet the DOE psychiatrist's definition of habitual, excessive use of alcohol to excess, *i.e.*, intoxication more than four times in a year. Moreover, he testified that in his opinion the individual did not minimize the amount of alcohol that he consumed between 2004 and 2006. The personal psychiatrist did concede at the hearing that "[d]rinking alone in a parking lot doesn't look normal." *Id.* at 162. He explained that the individual's choice of a parking lot has a lot to do with his personality in that he is an introvert. *Id.* at 162. He concluded that it is important to examine all the circumstances surrounding the individual's decision to drink in the parking lot instead of looking at the fact in isolation.

After carefully reviewing all the testimonial evidence, I have determined that the individual's post-1998 alcohol use did not rise to the level of habitual, excessive use of alcohol during this period. In reaching this determination, I considered that the individual did not meet the DOE psychiatrist's definition of habitual, excessive use of alcohol to excess in that he was not intoxicated four or more times in any year between 1998 and 2006. Specifically, I found that the individual would not have been considered intoxicated by using either his own definition of intoxication (*i.e.* lack of balance, slurring words and forgetfulness) or by applying the Widmark equation variables set forth in Exhibit 6, page 12 at footnote 32.⁴ While I found the individual's choice of drinking venues (in a parking lot) to be very unusual,⁵ I considered that the individual would probably have consumed alcohol at home if his wife had allowed him to do so. I next evaluated whether it is reasonable to consider the quantity of alcohol he consumed during 2004-2006 excessive had he consumed it at home or in a drinking or eating establishment. On this matter, I considered that drinking 37 ounces of beer over a two-hour period might possibly be considered excessive. However, I did not find that consuming that quantity twice in a year (2004) was habitual, excessive alcohol consumption. Regarding his other drinking in 2004, *i.e.*, 20 ounces of beer on four other occasions, this quantity does not seem excessive to me. Similarly, consuming 20 ounces of beer over a two-hour period on six occasions in 2005, and 20 ounces of beer over a

⁴ There are several factual errors contained in footnote 32 of the Psychiatric Report relating to the application of the Widmark equation in this case. Based on the credible testimony in this case, I found that the individual's highest consumption of alcohol over a two-hour period between 1998 and 2006 was 37 ounces. For most of the period in question, the alcohol consumption was 20 ounces in a two-hour period. However, the DOE psychiatrist used 48 ounces and 64 ounces (four 16-ounce beers) to compute the individual's hypothetical blood alcohol content (BAC) in this case. Had the DOE psychiatrist used the 20 ounce and 37 ounce figures, the hypothetical BAC would have been far below the legal intoxication limit.

⁵ My observation of the individual at the hearing confirmed the personal psychiatrist's opinion that the individual is an introvert. The individual rarely made eye contact with me during the hearing and spent much time with his head downcast.

two-hour period on two occasions on 2006 does not seem excessive. In addition, the individual convinced me that he was never impaired after consuming alcohol in the car. Given that the individual drove his stepchildren to various after school activities and cooked dinner almost every night, it seems reasonable that he might not have been able to perform these duties without incident had he been impaired. Finally, I found the testimony of the personal psychiatrist to be more convincing than that of the DOE psychiatrist in this case. In particular, the personal psychiatrist testified convincingly that the individual's alcohol consumption since 1998 has never impaired him socially or occupationally or ever caused him legal or health problems.⁶

2. Reformation from Past Habitual, Excessive Use of Alcohol

I next must address whether the individual has demonstrated adequate reformation from his habitual, excessive use of alcohol between the late 1970s and 1998. First, more than eight years has elapsed since the individual consumed alcohol habitually to excess. Second, he acknowledged at the hearing that he drank alcohol to excess prior to his 1998 marriage. Third, his marriage to his current wife caused him to severely curtail his drinking habits. For example, he did not drink at home and rarely drank in social situations. During the eight year period, 1998 to 2006, he consumed an average of no more than two beers approximately six times a year when he was alone in a grocery store parking lot. Fourth, the individual and his wife convinced me that it is unlikely that the individual will drink alcohol in a parking lot again. Whether it is fear or love that compels the individual to abide by his wife's wishes, it is clear from the testimony that the individual will heed his wife's request that he stop drinking in the grocery store parking lot. Finally, the individual stopped consuming alcohol entirely in June 2006. In the end, all these factors convince me that the individual is reformed from his habitual, excessive use of alcohol during the late 1970s until 1998.

B. Criterion L

1. Concealment of Alcohol Use

During the psychiatric examination, the individual stated that his wife was unaware that he was consuming alcohol in a grocery store parking lot from time to time. At the hearing, the individual and his wife convinced me that his wife now knows about the individual's past consumption of alcohol in a grocery store parking lot. The wife also convinced me that she only prohibited her husband from drinking at home, not outside the home. Regarding the individual's selection of a grocery store parking lot to consume alcohol, the individual testified convincingly that he chose that venue for several reasons,

⁶ Regarding the allegation in the Notification Letter that the individual's wife asked him to stop drinking alcohol and he did not, I find that that his wife only asked him to stop drinking alcohol in the house. The record is clear that the individual complied with his wife's request in this regard. As for the allegation in the Notification Letter that the individual's mother expressed a concern about the individual's excessive drinking habits, I find, based on the testimonial evidence in this case, that the individual's mother expressed this concern prior to 1998. The individual testified convincingly that his mother expressed concern about his drinking habits when he was in college. Tr. at 127. The wife testified credibly that her mother-in-law has commented positively on the changes regarding the individual's drinking once he married her in 1998.

i.e., he had promised his wife that he would not consume alcohol at home, he was too cheap to go to a bar or restaurant and buy alcoholic beverages, and he wanted peace and quiet to listen to tapes and write scripts for his hypnosis sessions.

I find that the individual has mitigated the security concern associated with his behavior. Because his wife is now aware that he consumed alcohol in a grocery store parking lot, I find that he is no longer vulnerable to coercion, exploitation, or duress, or susceptible to blackmail with regard to this matter.

2. Improper Use of the Government-Issued Computer

The individual used his government computer to access his personal e-mail account and then sent sexually explicit e-mail approximately 12 times in October 2004. Tr. at 106, 132; Ex. 10 at 6. The last time that he used his government computer for this purpose was sometime in October 2004. Tr. at 107. The individual testified that he sought counseling to help him increase his self esteem and to avoid sexually explicit chat rooms. *Id.* He also testified that one of his counselors set up a plan for him that included self-hypnosis and “time-fillers.” *Id.* at 113. To fulfill part of the plan, the individual enrolled in 350 hours of training in hypnosis and became a certified master hypnotist. *Id.* at 109. He explained in detail at the hearing a technique called “mind-mapping,” a technique that he is using to wean himself off the internet. He testified that he is “done with the internet” because his family means more to him than the internet. *Id.* at 129. He stated that he likes himself now that he is using hypnosis. *Id.* at 145.

The wife testified about the progress that she and her husband have made in dealing with the individual’s use of the internet in general, not just at work. She testified that when she first learned of her husband’s sending of sexually explicit e-mails, she was devastated. *Id.* at 89. She stated that “I drug him by his ear to the counselor and said, ‘Figure out what’s wrong with him, because I am not going to deal with it.’” *Id.* Her attitude at the time was “you go there and do what you have to do and fix yourself and tell me when you’re done.” *Id.* She soon recognized that this approach did not work because he continued to use the home internet to access sexually explicit chat rooms. At the time, she would ask him if he could stay away from the computer when she was out of town. If he responded negatively, the wife would pull the router out of the hub and put it in her suitcase to eliminate the problem. *Id.* at 90. When the individual returned to Counselor #1, Counselor #1 referred him to Counselor #2, a person who specialized in sexual addiction. Counselor #1 also advised the wife that she was acting hateful towards her husband and that she needed to change her attitude to assist her husband. *Id.* at 93. Together, the individual and his wife started working on his problem. Jointly, they decided that the individual’s behavior was a choice, not a compulsion.⁷ According to the wife, the individual became a licensed hypnotist to address his “choice” to go to chat rooms. *Id.* at 92. The wife explained that her husband goes to bed with headphones on listening to hypnosis scripts that influence his thinking. *Id.* She stated that her husband has

⁷ The DOE psychiatrist opined that the individual did not suffer from a mental illness or condition that caused him to engage in this behavior.

successfully used the hypnosis to assist him stop chewing tobacco. *Id.* She added that she is trying to be more communicative with her husband with regard to this “internet stuff.” *Id.* at 85. She added that the information set forth in the Psychiatric Report has actually helped her and her husband communicate more as it highlighted some misperceptions that the individual had about his wife’s behavior.⁸ She ended her testimony by stating that she is confident that her husband will not use the internet inappropriately at home⁹ or at work in the future.

The individual’s supervisor testified that she spoke to the individual about his inappropriate use of the internet and he assured her that he would not engage in that conduct again in the workplace. *Id.* at 39. She testified that she believed he was sincere because “he’s always done everything she’s asked of him.” *Id.*

After carefully reviewing the testimonial evidence, I have decided that the individual has mitigated the security concern associated with his improper use of the internet at work. It has been more than two years since he last engaged in the improper conduct at work. He has received counseling to address the issues underlying his desire to communicate via sexually explicit e-mail. He and his wife are communicating in a positive way with regard to this issue. The individual underwent 350 hours training to become a licensed, certified hypnotist to assist in his efforts to stay away from the internet. The individual testified convincingly and his wife and his supervisor confirmed that the individual has made promises to them that he will not engage in the conduct again.

VI. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Criteria J and L. After considering all the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has brought forth sufficient evidence to mitigate the security concerns at issue. I therefore find that restoring the individual’s access authorization will not endanger the common defense and is clearly consistent with the national interest. Accordingly, I have determined that the individual’s

⁸ For example, the individual told the DOE psychiatrist that his wife became so angry when she discovered that he had found a beer can in his truck that she did not speak to him for a few days. Ex. 6 at 11. At the hearing, the wife related that had she been angry about the matter, she would have verbalized her anger. Tr. at 67. Regarding her silence in question, she testified that she had retreated to bed for two days because she missed her late husband and child who were killed in an automobile accident. *Id.* at 68. She then explained how awkward it is for her to discuss this subject matter with her current husband. *Id.* Nevertheless, when she read the Psychiatric Report, she told the individual that her silence and withdrawal at times are rooted in her grief.

⁹ The DOE security concern is only with the individual’s use of the government computer at work to transmit sexually explicit e-mails. The DOE expresses no concern with regard to the individual’s use of his home computer for this purpose. See *Personnel Security Hearing* (TSO-0212), <http://www.oha.doe.gov/cases/security/tso0212.pdf> at 12, f.n.9.

access authorization should be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: March 7, 2007